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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

No. 301

UNITED STATES OF AMERICA,
Respondent,

vs.

ABRAHAM TEITELBAUM,
Petitioner.

ABRAHAM TEITELBAUM,
Petitioner,

vs.

EUGENE C. COYLE, JR., and HON. MORTIMER J. CAPLIN,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ABRAHAM TEITELBAUM,
30 North LaSalle Street,
Chicago, Illinois 60602,
Petitioner, Attorney pro se.

THE CONTINENTAL-WARREN PRINTING COMPANY, CHICAGO

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EUGENE C. COYLE, JR., and HON. MORTIMER J. CAPLIN,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Petitioner Abraham Teitelbaum is acting as his own attorney, having been duly admitted to practice at the bar of this Honorable Court in 1931, and prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Seventh Circuit, entered in cause 14672 and cause 14673, on February 10, 1965.

OPINIONS BELOW.

The Court below affirmed the District Court's orders granting respondents' motion for summary judgment and motion to dismiss, respectively.

The opinion of the Court of Appeals, printed in Appendix B *infra*, p. 18, is reported in 342 F. 2d 672. No opinions were rendered by the District Court; its orders, granting respondents' motion for summary judgment, and motion to dismiss, are likewise printed in Appendix B, *infra*, pp. 24, 25.

JURISDICTION.

The judgment of the Court of Appeals affirming the orders of the District Court was entered on February 10, 1965. (Appendix B, *infra*, p. 18.) A timely petition for rehearing was denied on March 30, 1965. (Appendix B, *infra*, p. 23.) The jurisdiction of the Court is invoked under 28 U. S. C. Section 1254 (1).

QUESTIONS PRESENTED.

Whether the petitioner's rights were violated under the Fifth Amendment to the Constitution of the United States by the District Court Judge in granting a summary judgment without taking evidence on disputed questions of fact.

2. Whether the United States may maintain a suit to reduce to judgment, Tax Court deficiency determinations, when such judgment would indefinitely extend the Six Year Statute of Limitations for collection, contrary to the expressed intention of Congress as set forth in the Internal Revenue Code, Section 6502, 26 U. S. Code. 1958 ed.

3. Whether under the doctrine of *Enochs* v. *Williams Packing Co.*, 370 U. S. 1, petitioner may sue to enjoin col-

lection of income taxes when he has received no credit nor refund of the excess amount collected from him under jeopardy assessment payments, where his tax matters in the Tax Court were consolidated for trial and where the Tax Court's determinations of deficiencies expressly did not take into consideration the jeopardy assessments made prior to the issuance of the notices of deficiency.

4. Whether the Court below erred in affirming the District Court's orders granting respondents a summary judgment in cause 14672, and in dismissing with prejudice petitioner's suit in cause 14673, without taking evidence on disputed questions of fact involved in both actions.

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED.

The pertinent portions of the Constitution and Statutes involved are set out in Appendix A, *infra*, pp. 15-17.

STATEMENT.

The first action (Cause 14763) was commenced by petitioner, on May 23, 1963, in the United States District Court for the Northern District of Illinois. The respondents, on September 24, 1963, moved to dismiss the complaint. On April 10, 1964, the District Court ordered that the complaint be dismissed with prejudice.

1. The action arose under the equity jurisdiction of the United States Courts, Title 28, U. S. Code, and the Internal Revenue Code of 1954, 26 U. S. C. Section 7421(a). The matter in controversy exceeds, exclusive of interest and costs, the sum of Ten Thousand ($10,000.00) Dollars. Petitioner does not have a plain, speedy and efficient remedy at law.

2. It appears to the petitioner that the respondents are engaged and are about to engage in acts and practices which constitute and will constitute violations of the petitioner's right to be free from deprivation of his property without due process of law, and which subject his possessions to search and seizure to collect a purported assessment made on August 23, 1957, against petitioner and Esther Melnick Teitelbaum, his former wife, on joint tax liabilities for the years 1949, 1950, and 1951.

3. Respondent, Honorable Mortimer R. Caplin, was the then Commissioner of Internal Revenue, and an agent of the Internal Revenue Service, which is a division of the United States Treasury Department, and by virtue of his office was responsible for and nominally in charge of the activities of all the members of that service, including the other respondent, Eugene C. Coyle, Jr., who is the Chicago District Director of Internal Revenue and an agent of the Internal Revenue Service, within the United States Treasury Department.

4. Petitioner is an attorney at law admitted to the Bar of Illinois in 1929; to the Bar of the United States District Court for the Northern District of Illinois in 1929; to the Bar of the United States Court of Appeals, Seventh Circuit, in 1932, and to the Bar of this Honorable Court in 1931. He is a citizen of the State of Illinois, and practices law in the City of Chicago, Cook County, Illinois.

5. The petitioner and Esther Melnick Teitelbaum, hereafter sometimes referred to as Melnick, were husband and wife during the years 1944, to 1951, inclusive. They also were attorneys at law, during that time, licensed to practice in the State of Illinois, and they practiced as sole partners under the firm name of Teitelbaum and Melnick.

6. Petitioner filed individual income tax returns for the years 1944, 1945, 1946, and 1947, with the then Collector of Internal Revenue, Chicago, Illinois.

Petitioner and Melnick filed joint income tax returns for the years 1949, and 1950, with the then Collector of Internal Revenue, Chicago, Ilinois, and a joint income tax return for 1951, with the Director of Internal Revenue, Chicago, Illinois.

7. The petitioner and the Commissioner had executed a series of consent agreements with respect to each of the years 1945, 1946, and 1947, extending to June 30, 1952, the time within which the Commissioner might assess additional income taxes for the years 1945, 1946, and 1947. The Commissioner, on December 21, 1951, by jeopardy assessment, assessed deficiencies in income tax, penalties and interest thereon, for each of the years 1944, to 1947, inclusive. Petitioner filed his petition for redetermination in the Tax Court of the United States. During the pendency of those proceedings, petitioner, on behalf of himself and his partner Melnick, paid under protest the jeopardy assessment in excess of $340,000.00, including taxes, interest, penalties and costs, for the years 1944 through 1947. On August 4, 1952, a receipt was given to petitioner by the Commissioner evidencing payment in full for all taxes, penalties and interest.

8. In 1955, there was another jeopardy assessment against petitioner for the years 1949 through 1951, and he likewise petitioned the Tax Court of the United States for redetermination.

His petitions for redetermination of both assessments were consolidated for trial in the Tax Court.

9. On May 20, 1960, the Tax Court rendered its decisions which established that total deficiencies in income tax and additions to tax due from petitioner were:

Years 1944 to 1947, inclusive (Appendix B, *infra*, p. 26)	$124,899.15
Less: Overpayments (Appendix B, *infra*, p. 27)	10,125.83
	$114,773.32
Years 1949 to 1951, inclusive (Appendix B, *infra*, p. 28)	309,815.90
Grand Total Deficiencies and Additions to Tax—Years 1944 to 1947, inclusive, and 1949 to 1951, inclusive	$424,589.22

The Tax Court also held that all of the above deficiencies do not take into consideration the jeopardy assessments made prior to the issuance of the notices of deficiency. (Appendix B, *infra*, p. 27.)

10. Prior to the Tax Court decisions, payments made by petitioner aggregate $406,723.57 (Appendix C, *infra*, p. 30), which together with a credit of $21,580.26, which sum the Commissioner, on February 3, 1964, applied to petitioner's account, make the total sum of $428,303.93.

When the established total deficiencies and additions to tax of $424,589.22, is subtracted from petitioner's credit and jeopardy assessment payments of $428,303.93, an overpayment of $3,714.71, results in petitioner's favor.

11. Contrary to Section 6861 (f), of the Internal Revenue Code of 1954 (26 U. S. C. Sec. 6861), the Commissioner did not credit petitioner with the excess amount collected by jeopardy assessment payments for the years 1944 to 1947, inclusive, nor did the Commissioner refund or apply the same towards petitioner's liabilities for the tax years 1949, 1950, and 1951.

12. The jeopardy assessment for 1949, 1950, and 1951,

against petitioner's former wife was abated prior to the Tax Court trial.

The Commissioner claimed, since the taxes, interest and penalties determined to be due by the Tax Court for 1949, 1950, and 1951, were not paid, there was no release of the taxpayer or his former spouse by virtue of the abatement of the jeopardy assessment.

13. The second action (Cause 14762) was commenced by the United States, on June 3, 1963, after petitioner had brought his action. Both cases were filed in the same District Court. The orders of court were entered by the same trial judge.

14. The purpose of this action was to reduce to judgment the Tax Court's deficiency determinations for 1949, 1950, and 1951. Admittedly, one of the objectives of the suit was to obtain a judgment which would extend the statutes of limitation for collection.

15. The United States moved for summary judgment, and the District Court granted the motion. (Appendix B, *infra*, p. 24.)

REASONS FOR GRANTING THE WRIT.

The decision of the Court of Appeals renders ineffectual petitioner's right to due process under the guise of a broad statutory prohibition of suits "for the purpose of restraining the assessment or collection of any tax." 26 U. S. C., Sec. 7421(a). It is inconsistent with the decision of this Court in *Enochs* v. *Williams Packing Co.*, 370 U. S. 1, which established the doctrine that the attempted collection may be enjoined if equity jurisdiction otherwise exists when it is clear that under no circumstances could the government ultimately prevail.

The decision threatens to create a substantial area of

dispute between the government and taxpayers who have paid and those who have not paid taxes under the revenue acts.

Section 7421(a) of the Internal Revenue Code of 1954 (26 U. S. C. Sec. 7421(a)), does not command "double-payment" of taxes. It does not restrain a suit to prevent assessment or collection of taxes already paid, nor does it prevent a suit to restrain an action to prevent a second collection of taxes already paid.

The petitioner is entitled to a refund or credit without filing a claim (Section 6861(f), 26 U. S. C.) on account of his jeopardy assessment payments made prior to the tax court's determination of deficiencies for 1944 to 1947, inclusive, and for 1949 to 1951, inclusive, in consolidated proceedings, when the Tax Court expressly did not take into consideration the jeopardy assessments made prior to the issuance of the notices of deficiency. (Appendix B, *infra*, p. 27.)

The Court of Appeals and the lower court misapprehended petitioner's suit because the Government has not given petitioner credit for the $406,723.57, jeopardy assessment payments made by him, prior to the Tax Court decisions. *Teitelbaum* v. *Commissioner*, 294 F. 2d 541, cert. denied, 368 U. S. 987. (Appendix B, *infra*, p. 27; Appendix C, *infra*, p. 30.)

Petitioner offered defenses to the Government's suit for summary judgment which were triable and incompatible with summary judgment, *DiBattista* v. *Centennial Insurance Company*, 201 N. E. 2d 466, 52 Ill. App. 2d 84 (Appendix B, *infra*, p. 19; Appendix C, *infra*, p. 30), and appellant was thus denied his constitutional right of due process of law.

In a landmark case: *Hurtado* v. *California*, 110 U. S. 516, this Court said that due process of law is a law which hears

before it condemns, proceeds on inquiry, and grants judgment only after a fair trial. The granting of the Government's motion for summary judgment on triable issues of fact was a denial of petitioner's vested right.

The Court of Appeals in its decision herein (Appendix B, *infra,* p. 21) said: "It is clear that the taxes, interest and penalties determined to be due by the tax court for 1949, 1950, and 1951, were not paid. . . ."

This statement is respectfully challenged for the reason that the Court of Appeals overlooked petitioner's payments of $406,723.57, to the Government on jeopardy assessments (Appendix B, *infra,* pp. 18-22; Appendix C, *infra,* p. 30) which together with the "credit" of $21,580.36, the Government applied to petitioner's account on February 3, 1964, establishes an overpayment of $3,714.71, in petitioner's favor. Section 6512, Internal Revenue Code of 1954. (26 U. S. C. 1958 ed., Section 6512.)

The Tax Court pointedly stated (Appendix B, *infra,* p. 27) that the found deficiencies against petitioner did not take into consideration his payments under the jeopardy assessments, made prior to the issuance of the deficiency notices. Petitioner paid the jeopardy assessments which totaled $406,723.57, and he is not seeking a declaratory judgment by means of a collateral attack on the decisions of the Tax Court. On the contrary, petitioner only seeks to have the Government apply his jeopardy assessment payments as it should, against the deficiencies and additions to tax as determined; otherwise, the Government would be unjustly enriched and petitioner's money illegally confiscated. Sections 6512 and 6861(f), Internal Revenue Code of 1954. (26 U. S. C. 1958 ed., Secs. 6512; 6861(f).)

Section 6512 of the Internal Revenue Code of 1954 (26 U. S. C. 1958 ed., Sec. 6512), provides for credits and re-

funds to taxpayers. The government did not credit petitioner with the jeopardy assessment payments of $406,723.57, toward these deficiencies and additions to tax; although, the Government issued original receipts to him for the payments. (Appendix C, *infra*, p. 30.) Respondent on February 3, 1964, credited petitioner with a payment of $21,580.36. At issue is the $406,723.57, jeopardy assessment payments made by petitioner. No refund or credit to his account for these payments was made by the Government against the deficiencies for the year 1949, 1950, and 1951. And it is fair to ask: What happened to the $406,723.57, petitioner paid to the Government? Section 6861(f), of the Internal Revenue Code of 1954. (26 U. S. C. 1958 ed., Sec. 6861(f).) Petitioner is entitled to an accounting from respondents.

When the Tax Court determines the deficiency in tax and its decision becomes final, it is necessary to assess the tax against the taxpayer and notify him of the assessment and demand payment of the tax. Section 6215, Internal Revenue Code of 1954. (26 U. S. C. Sec. 6215.) After assessment, if the tax is not paid, the Government must collect the tax by levy or a proceeding in Court within six years. Section 6502, Internal Revenue Code of 1954. (26 U. S. C. Sec. 6502.) Here, the assessments for 1949 through 1951, were made as jeopardy assessments pursuant to Section 6861, Internal Revenue Code of 1954 (26 U. S. C. Sec. 6861), and, thereafter, petitioner petitioned the Tax Court for a redetermination of the assessments. Section 6861 of the Internal Revenue Code of 1954 (26 U. S. C. Sec. 6861), provides that unpaid portions of the amount of the assessments must be collected after the decision of the Tax Court has become final and that any amount of the assessment over the amount of deficiency determined shall be abated.

It is respectfully suggested to this Honorable Court that

no such notice was given to petitioner after the decision of the Tax Court within the time prescribed by law nor was any abatement of tax made, as to payments of taxes collected over and above the final decision of the Tax Court.

The Government admitted herein the objective of such suit was to obtain a judgment which could extend the statute of limitations for collection and on which execution could be issued.

Section 6502 of the Internal Revenue Code of 1954, establishes the period of time for collection after assessment. It states specifically that the levy must be made or the proceeding begun within six years after the assessment of the tax, or prior to expiration of time by agreement. It does not give the Government the right to seek . . . by judicial process . . . an extension of the period or collection from six years to a possible twenty-six years, or more. An extension of the period could only be accomplished through an Act of the Congress of the United States. The expressed intent of Congress controls both Government and petitioner.

Here, the right to collect taxes ceased after 6 years, as provided by the Revenue Act of 1954 (26 U. S. C. 1958 ed., Sec. 6502). Yet, respondents collected $21,580.36, on February 3, 1964, which they had no legal right to do, since the 6 years had expired on August 22, 1963. This was done under the guise of seeking judgment on the Tax Court deficiencies and to extend the 6 year statute of limitation in the second action (Cause 14672). That action is not a collection suit. And no legal precedent exists for a court to extend the statute of limitations for collection. Here, the ruling is a case of first impression and should be decided by this Honorable Court. It is a matter of general importance in the administration of the revenue acts. There is no precedent for the decision of the Court of Appeals

nor the action of the lower court. A suit to secure a judgment on tax court determinations of deficiencies is not a collection proceeding. (Appendix B, *infra*, p. 19.)

The District Judge recognized the payment of $21,580.36, by his judgment order. (Appendix B, *infra*, p. 24.) This amount was deducted from the $377,536.67 judgment sought by respondent's complaint, thereby proving that accountings are necessary, and that triable issues of fact exist which precludes any summary judgment.

The decision of the Court of Appeals is inconsistent with its opinion, involving Section 7421(a) of the Internal Revenue Code of 1954 (26 U. S. C. Sec. 7421(a)), in *Homan Mfg. Co.* v. *Long*, 242 F. 2d 645, 656, where the court said a summary judgment proceeding is not a substitute for a trial, but rather a judicial search for determining whether genuine issues exist as to material facts. It ruled, a lower court cannot try out factual issues on a motion for summary judgment because once such an issue is found the court's function on that aspect of the case ends. It is the facts playing in, on or about the assessment which are in issue and their presence is enough to prevent a summary judgment, the Court of Appeals pointed out.

Summary judgment is aptly described, "as a method of promptly disposing of actions in which there *is no genuine issue as to any material fact . . .*" (53 Am. Jur. Sec. 17); *Reynolds Metals Co.* v. *Metals Disintegrating Co.*, 8 F. R. D. 349, Aff'd. 176 F. 2d 90 (1948); *Rolle Mfg. Co.* v. *Marco Chemicals, Inc.*, 92 F. Supp. 218 (1948); Fed. Rules Civ. Proc., Rule 56 (b, c), 28 U. S. C. (emphasis supplied).

A summary judgment may not be granted under federal rules if there be an issue presented as to the existence of *any* material fact, and before such motion shall be granted *all doubts* as to existence of a genuine issue of material fact must be resolved against the party moving for sum-

mary judgment, *Sarnoff* v. *Ciagilia,* 165 F. 2d 167 (1948); *Zig Zag Spring Co.* v. *Comfort Spring Corp.,* 89 F. Supp. 410 (1950) (emphasis supplied). Whether the petitioner has paid his taxes and is not obligated to the government *is a genuine issue of material fact.* Especially when he offers receipts evidencing payment, it is in the first instance *a substantive determination to be made by the trial court* from the facts of the case, in light of the fundamental criteria laid down by the Fifth Amendment. (Emphasis supplied.)

A summary judgment is proper when the moving party is entitled to judgment as a "matter of law." *Silvary Lighting* v. *Versen,* 10 F. R. D. 507 (1950). In *Guat* v. *Richardson,* 39 N. E. 2d 337, 339, 379 Ill. 626 (1942), the court held that to become a "matter of law" there must be *no* evidence tending to establish petitioner's case (emphasis supplied). In the present case there *is* evidence supporting the petitioner's contention that his constitutional rights were unreasonably abridged.

The Court below in affirming the orders of the lower court denied petitioner his right to due process as guaranteed under the Fifth Amendment to the Constitution of the United States. He was not allowed his right to a showing of "administrative caprice" plus special and extraordinary circumstances sufficient to bring the case within an acknowledged field of equity jurisprudence. He was denied a trial and was denied his day in court.

CONCLUSION.

For the reasons stated above, the decision of the Court of Appeals raises a question of general importance in the administration of the tax laws which should be reviewed by this Court, and we respectfully submit that this petition for a writ of certiorari should be granted.

ABRAHAM TEITELBAUM,
30 North LaSalle Street,
Chicago, Illinois 60602,
Petitioner, Attorney pro se.

APPENDIX A.

Statutes and Constitutional Provisions Involved.

Constitution:

Article V of the Amendments to the United States Constitution, which provides in part as follows:

> ". . . nor shall any person be . . . deprived of life, liberty, or property, without due process of law; . . ."

Internal Revenue Code of 1954:

Sec. 6215. Assessment of Deficiency Found by Tax Court.

(a) *General Rule.*—If the taxpayer files a petition with the Tax Court, the entire amount redetermined as the deficency by the decision of the Tax Court which has become final shall be assessed and shall be paid upon notice and demand from the Secretary or his delegate. No part of the amount determined as a deficiency by the Secretary or his delegate but disallowed as such by the decision of the Tax Court which has become final shall be assessed or be collected by levy or by proceeding in court with or without assessment.

* * * * * *

(26 U. S. C. 1958 ed., Sec. 6215.)

* * * * * *

Sec. 6502. Collection After Assessment.

(a) *Length of Period.*—Where the assessment of any tax imposed by this title has been made within the period of limitation properly applicable thereto, such tax may be

collected by levy or by a proceeding in court, but only if the levy is made or the proceeding begun—

(1) within 6 years after the assessment of the tax, or

(2) prior to the expiration of any period for collection agreed upon in writing by the Secretary or his delegate and the taxpayer before the expiration of such 6-year period (or, if there is a release of levy under section 6343 after such 6-year period, then before such release).

The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

* * * * *

(26 U. S. C. 1958 ed., Sec. 6502.)

* * * * *

Sec. 6861. Jeopardy Assessments of Income, Estate, and Gift Taxes.

* * * * *

(f) *Collection of Unpaid Amounts.*—When the petition has been filed with the Tax Court and when the amount which should have been assessed has been determined by a decision of the Tax Court which has become final, then any unpaid portion, the collection of which has been stayed by bond as provided in section 6863(b) shall be collected as part of the tax upon notice and demand from the Secretary or his delegate, and any remaining portion of the assessment shall be abated. If the amount already collected exceeds the amount determined as the amount which should have been assessed, such excess shall be credited or refunded to the taxpayer as provided in section 6402, without the filing of claim therefor. If the amount determined as the amount which should have been assessed is greater than

the amount actually assessed, then the difference shall be assessed and shall be collected as part of the tax upon notice and demand from the Secretary or his delegate.

* * * * *

(26 U. S. C. 1958 ed., Sec. 6861.)

Sec. 7421. Prohibition of Suits to Restrain Assessment or Collection.

(a) *Tax.*—Except as provided in section 6212 (a) and (c), and 6213 (a), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court.

* * * * *

(26 U. S. C. 1958 ed., Sec. 7421.)

APPENDIX B.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit.

September Term 1964

Nos. 14672-673 January Session 1965

UNITED STATES OF AMERICA,
Plaintiff-Appellee,
vs.
ABRAHAM TEITELBAUM,
Defendant-Appellant.

ABRAHAM TEITELBAUM,
Plaintiff-Appellant,
vs.
EUGENE C. COYLE, JR., et al.,
Defendants-Appellees.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

February 10, 1965

Before DUFFY and CASTLE, *Circuit Judges,* and GRUBB, *District Judge.*

DUFFY, *Circuit Judge.* Each of these appeals involves federal income taxes together with penalties and interest for the taxable years 1949, 1950 and 1951. On August 23, 1957, assessments were made against taxpayer. For the year 1949, the assessment was for taxes and interest. For

the years 1950 and 1951, the assessments included taxes, interest and penalties.

Taxpayer filed an appropriate petition with the Tax Court of the United States. On May 20, 1960, that Court entered its decision holding there were deficiencies in taxes, together with penalties and interest, as to taxpayer's tax liability for 1949, 1950 and 1951. A review was taken to this Court and the decision of the Tax Court was sustained, 294 F. 2d 541. A petition for certiorari was denied, 368 U. S. 987.

Within six years of the date of the assessments, the Government brought suit against the taxpayer in the United States District Court for the Northern District of Illinois, Eastern Division. The purpose of this action was to reduce to judgment the Tax Court's deficiency determinations for 1949, 1950 and 1951. The suit also sought to reduce to judgment, assessments which had been made with respect to 1958 and 1961 taxes. Admittedly, one of the objectives of the suit was to obtain a judgment which would thus extend the statutes of limitations.

Taxpayer, who has appeared in these matters pro se, answered with a "special plea." Points raised were that 1) the United States was not the proper party plaintiff; 2) the suit was barred by res judicata or collateral estoppel since the Tax Court had already entered its decision on the same matter; 3) that as a deficiency assessment made against taxpayer's former wife had been abated, he was released on the legal principle that release of one joint obligor releases the others, and 4) that he had not been given proper credit to reflect payments which he had made on the tax liability involved.

The United States moved for summary judgment. The District Court granted the motion but only in part. It denied summary judgment for the years 1958 and 1961.

On motion of the Government, the District Court dismissed, without prejudice, the collection action as to the years 1958 and 1961.

In the second case before us, the taxpayer, on May 23, 1963, commenced a suit for an injunction. The suit sought to restrain Coyle, the Chicago District Director of Internal Revenue, and Caplin, the then Commissioner of Internal Revenue, from enforcing collection of the 1949, 1950 and 1951 tax liabilities. The complaint further sought an order which, if issued, in effect would have abated the assessments made against him for the stated three year period.

In many respects, the complaint in the second suit is similar to taxpayer's "special plea" in the collection suit. In addition, the complaint contained allegations that the Government was harassing taxpayer, and that the prior Tax Court decision operated as a bar to any subsequent legal action by the Government to collect the taxes due.

In the second suit, the Government moved to dismiss taxpayer's complaint on the grounds 1) neither Messrs. Coyle nor Caplin had been personally served; 2) that Section 7421 of the Internal Revenue Code of 1954 was a bar to injunctive relief, and 3) that the complaint failed to state a claim upon which relief could be granted. On April 10, 1964, the District Court, on the Government's motion, dismissed taxpayer's complaint with prejudice. Thereafter a timely notice of appeal was filed.

In the first appeal, we hold that the granting of a summary judgment in favor of the United States was proper. The substantive issues of tax liability for 1949, 1950 and 1951 had been fully litigated in the Tax Court. The decision of the Tax Court had been affirmed by this Court. There were no material issues of fact remaining to be tried. However, the Tax Court lacks the power to order

execution, and this, in spite of the fact that its decisions are entitled to have applied the doctrine of res judicata and collateral estoppel. Hence, a suit to reduce the determined deficiencies to judgment was proper.

We also overrule the contention of taxpayer that because a jeopardy assessment against the taxpayer's former wife was abated prior to the Tax Court trial, he was thereby released from payment of the tax. It is clear that the taxes, interest and penalties determined to be due by the Tax Court for 1949, 1950 and 1951 were not paid and that taxpayer was not released in any way by virtue of the abatement of the jeopardy assessment against his wife.

We now consider taxpayer's second appeal. Ten days before the Government filed its complaint in the suit to reduce the Tax Court deficiency determinations to judgment, the taxpayer brought suit in the same United States District Court to enjoin the District Director and the then Commissioner of Internal Revenue from collecting the same deficiencies for the years 1949, 1950 and 1951.

Taxpayer did not obtain personal service on either defendant Coyle or defendant Caplin who were public officers of the United States Government, in the manner required by Rule 4(d)(5), Federal Rules of Civil Procedure. It appears the complaint was served on the United States Attorney in Chicago but this was not sufficient. *Federal Landlords Committee* v. *Woods* (1949), 9 F. R. D. 622.

Although the service of process was insufficient, we comment briefly on the merits of the contentions raised by taxpayer. His reliance on *Enochs* v. *Williams Packing Co.*, 370 U. S. 1, is misplaced. In that case, the District Court enjoined the collection of certain social security and unemployment taxes. By a two to one vote, the Court of Appeals affirmed. However, the Supreme Court unanimously reversed, holding the suit for injunction was

barred by § 7421(a) of the Internal Revenue Code of 1954. The *Enochs* case in no way supports taxpayer's contention herein.

Furthermore, in addition to seeking an injunction, taxpayer is, in effect, seeking a decree that the assessments against him are invalid. This amounts to a suit seeking a declaratory judgment by means of a collateral attack on the decision of the Tax Court. Declaratory judgments in tax cases are forbidden by 28 U. S. C. § 2201.

We hold the District Court properly granted a motion for summary judgment establishing taxpayer's liability for the years 1949, 1950 and 1951.

We further hold the District Court properly dismissed with prejudice taxpayer's suit to restrain the collection of the taxes involved in the Government's collection suit.

AFFIRMED.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

Chicago, Illinois, 60610

Tuesday, March 30, 1965

Before

Hon. F. Ryan Duffy, Circuit Judge,
Hon. Latham Castle, Circuit Judge,
Hon. Kenneth P. Grubb, District Judge.

UNITED STATES OF AMERICA, *Plaintiff-Appellee,*	Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 14672 *vs.*	
ABRAHAM TEITELBAUM, *Defendant-Appellant;*	
ABRAHAM TEITELBAUM, *Plaintiff-Appellant,*	
No. 14673 *vs.*	
EUGENE C. COYLE, JR., District Director of Internal Revenue, etc., et al.,	

IT IS ORDERED by the Court that the petition for a rehearing of this cause be, and the same is hereby DENIED.

UNITED STATES DISTRICT COURT,

Northern District of Illinois,

Eastern Division.

UNITED STATES OF AMERICA, *Plaintiff*, *vs.* ABRAHAM TEITELBAUM, *Defendant.*	Civil Action No. 63-C-976.

JUDGMENT ORDER.

This matter having come to be heard on plantiff's Motion for Summary Judgment for the delinquent income taxes owed by the defendant for the years 1949, 1950, 1951, 1958 and 1959, the taxes for the years 1949, 1950, and 1951 having been determined by the Tax Court of the United States, and the Court having considered the matter.

It Is Hereby Ordered, Adjudged and Decreed that the United States is granted Partial Summary Judgment for the tax years 1949, 1950 and 1951 for which the defendant, Abraham Teitelbaum, is obligated to the United States in the amount of $498,071.80 plus 6 per cent interest on $355,956.31 from April 10, 1964, the date of entry of this order, and statutory interest thereafter.

Enter:

R. B. AUSTIN,
Judge.

Dated at Chicago, Illinois, this 10th day of April, A. D., 1964.

UNITED STATES DISTRICT COURT,

Northern District of Illinois,

Eastern Division.

ABRAHAM TEITELBAUM, *Plaintiff*, *vs.* EUGENE C. COYLE, JR., District Director of Internal Revenue, etc., et al., *Defendants.*	Civil Action No. 63-C-918.

ORDER.

This matter having come to be heard on the motion of the defendants to dismiss the Complaint, and the Court having considered the matter,

It Is Hereby Ordered, Adjudged and Decreed that the Complaint be dismissed with prejudice.

Enter:

R. B. AUSTIN,
Judge.

Entered this 10th day of April, A. D., 1964.

TAX COURT OF THE UNITED STATES

Washington.

ABRAHAM TEITELBAUM, *Petitioner,* *vs.* COMMISSIONER OF INTERNAL REVENUE, *Respondent.*	Docket No. 40590.

DECISION.

Pursuant to the determination of the Court, as set forth in its Memorandum Findings of Fact and Opinion, filed January 29, 1960, the petitioner on February 11, 1960, filed "Computation by Petitioner Submitted in Absence of Agreement under Rule 50, and Exceptions to Certain Findings of Fact," and the respondent filed on April 5, 1960, "Respondent's Computation for Entry of Decision." The case was called for hearing on the Motions Calendar of May 18, 1960, at which time the parties were heard. After due consideration, it appearing that the respondent's computation is in accordance with the Court's Memorandum Findings of Fact and Opinion, it is

Ordered and Decided: That there are deficiencies in income tax and additions to tax under the Internal Revenue Code of 1939 for the taxable years and in the amounts as follows:

Year	Deficiency	Additions to Tax Sec. 293(b)
1944	$ 2,355.93	
1945	17,835.72	
1946	24,741.76	$12,370.88
1947	45,063.24	22,531.62

that all of the above deficiencies do not take into consideration the jeopardy assessments made prior to the issuance of the deficiency notice and do not take into account

for the taxable year 1946 the assessments of $1.43 in
73 income tax and $0.71 in addition to tax under section 293(b) of the Internal Revenue Code of 1939, both made on February 6, 1952; and there are overpayments in addition to tax under section 293(b), Internal Revenue Code of 1939, for the taxable years 1944 and 1945 in the respective amounts of $1,177.97 and $8,947.86, all of which amounts were paid after the mailing of the notice of deficiency.

(Signed) Russell E. Train,
Judge.

Entered May 20, 1960.

TAX COURT OF THE UNITED STATES.

ABRAHAM TEITELBAUM,
Petitioner,
vs.
COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Docket No. 71483.

DECISION.

Pursuant to the determination of the Court, as set forth in its Memorandum Findings of Fact and Opinion, filed January 29, 1960, the petitioner on February 11, 1960, filed "Computation by Petitioner Submitted in Absence of Agreement under Rule 50, and Exceptions to Certain Findings of Fact," and the respondent filed on April 5, 1960, "Respondent's Computation for Entry of Decision." The case was called for hearing on the Motions Calendar of May 18, 1960, at which time the parties were heard. After due consideration, it appearing that the respondent's computation is in accordance with the Court's Memorandum Findings of Fact and Opinion, it is

Ordered and Decided: That there are deficiencies in income tax and additions to tax under the Internal Revenue Code of 1939, for the taxable years and in the amounts as follows:

		Additions to Tax		
Year	Deficiency	Sec. 293(b)	Sec. 294(d) (1) (A)	Sec. 294 (d) (2)
1949	$ 28,968.62			
1950	60,318.66			$3,374.38
1951	136,574.99	$68,287.50	$12,291.75	

that all of the above deficiencies do not take into consideration the jeopardy assessments made prior to the issuance of the notice of deficiency; and that there is no

deficiency in addition to tax under section 293(b), Internal Revenue Code of 1939, for the taxable year 1950, and that there is no deficiency in addition to tax under section 294 (d)(2), Internal Revenue Code of 1939, for the taxable year 1951.

(Signed) Russell E. Train,
Judge.

Entered May 20, 1960.

APPENDIX C.

LIST OF PAYMENTS*

$	1,552.47
	35.00
	4,327.02
	1,475.72
	738.38
	36,013.59
	1,848.01
	25.88
	46,358.62
	1,873.89
	82,443.41
	1,625.12
	92.22
	4,540.54
	1,717.32
	588.47
	66.41
	33,647.93
	1,954.35
	45,340.98
	2.60
	1,663.56
	79,850.92
	5,000.00
	4,690.78
	41,791.54
	9.84
	2,361.11
	4,059.86
	1,028.03
$	406,723.57 Total

*Original receipts offered in open Court.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 301

ABRAHAM TEITELBAUM, PETITIONER

v.

UNITED STATES OF AMERICA

ABRAHAM TEITELBAUM, PETITIONER

v.

EUGENE C. COYLE, JR., and HON. MORTIMER J. CAPLIN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

These cases involve assessments for income tax, penalties, and interest against the taxpayer for the years 1949, 1950 and 1951. Petitioner's tax liability for those years was determined by the Tax Court of the United States (Pet. 28-29). The Tax Court's

memorandum opinion (P-H Memo T.C., par. 60,011) was affirmed by the United States Court of Appeals for the Seventh Circuit (294 F. 2d 541), and the taxpayer's petitions for certiorari and for rehearing were denied by this Court (368 U.S. 987 and 369 U.S. 842). The Tax Court decision thus became a final determination of the taxpayer's liability for the years 1949, 1950 and 1951.

The instant petition covers two cases which had been consolidated for purposes of appeal; both concern the petitioner's tax liability for 1949-1951. In *United States* v. *Abraham Teitelbaum*, the government brought a timely suit in the United States District Court for the Northern District of Illinois to reduce to judgment the petitioner's unpaid tax liabilities for 1949-1951 as determined by the Tax Court. This action was necessitated by the fact that the tax deficiencies for the years involved had not been paid or administratively collected, and the Tax Court lacks the power to order executions to issue on its decisions. Section 276(c) of the Internal Revenue Code of 1939 and Section 7402(a) of the Internal Revenue Code of 1954 contemplate the use of judicial proceedings in the district courts to collect tax deficiencies which have not been collected administratively; the government's timely collection suit in the instant case falls squarely within these provisions. At the trial in the district court, the government introduced supporting affidavits as to the amounts of petitioner's unpaid tax liabilities for the years in question and moved for summary judgment. The district court granted the government's motion as to the years 1949, 1950 and 1951

(Pet. 24).[1] The court of appeals affirmed (Pet. 20, 22). This decision was correct, since the taxpayer's liability for the tax deficiencies for these years had already been fully litigated in the Tax Court and affirmed on appeal. There were no material issues of fact remaining to be tried. *Commissioner* v. *Sunnen*, 333 U.S. 591.

In *Abraham Teitelbaum* v. *Eugene C. Coyle, Jr., and Mortimer J. Caplin* taxpayer initiated a suit in the same district court, ten days before the government's collection action was begun, to enjoin the District Director and the then Commissioner of Internal Revenue from collecting the 1949, 1950 and 1951 deficiencies. Taxpayer also sought, in effect, a decree holding invalid the deficiency assessments against him (Pet. 22). The district court dismissed the action with prejudice (Pet. 25), and the court of appeals affirmed (Pet. 21-22). In addition to constituting a collateral attack on the prior Tax Court decision, this suit was barred by Section 7421(a) of the Internal Revenue Code of 1954 barring the courts from restraining the collection of a tax and by 28 U.S.C. 2201 barring the federal courts from granting declaratory judgments in tax cases.

Petitioner now argues that he made excessive payments on his pre-1949 tax liabilities and that these overpayments should be carried forward against his 1949-1951 liabilities here in question (Pet. 6, 8-10).

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[1] The government also sought summary judgment for deficiencies for the years 1958 and 1961; as to these years the district court refused to enter summary judgment and dismissed the government's complaint without prejudice (Pet. 19-20, 24).

In 1960 the Tax Court determined petitioner's liabilities for the years 1944-1947 and 1949-1951 (Pet. 26-29). Petitioner states that some time before 1960, the Commissioner made jeopardy assessments against him and he paid approximately $406,000 on his pre-1949 liabilities (Pet. 6, 8-10). Petitioner asserts that these payments exceeded his pre-1949 liabilities as ultimately determined by the Tax Court and that the excess payments should be applied against his 1949-1951 liabilities (Pet. 6, 8-10). The Commissioner has admitted that petitioner's payments on his pre-1949 tax liabilities exceeded the amount owing thereon by approximately $12,000; petitioner was given credit against his 1949-1951 tax liabilities for that amount (R. 3).[2] Petitioner's proof does not demonstrate any greater overpayment. His own evidence shows that the $406,000 was not paid exclusively on his own liabilities; those payments were also made toward the 1944-1948 tax liabilities of his former wife and of a corporation (The Tyted Co.), neither of whose pre-1949 tax liabilities are disclosed by the record (R. 26-29). Moreover, petitioner's evidence also shows that the $406,000 was paid not only on his 1944-1947 taxes (the amount of which the Tax Court has determined) but also were made toward his own 1948 tax liabilities, the amount of which is unlitigated and undisclosed by this record (R. 26-29). Finally, the Tax Court decisions for both the 1944-1947 and the 1949-1951 tax periods do not include the interest (at 6%

[2] "R" references are to petitioner's printed appendix in the court of appeals.

per year) that is statutorily added to all deficiencies up to the date of payment (§ 6601, Internal Revenue Code). It is therefore apparent that petitioner's offer of $406,000 in receipts did not create a triable issue of fact as to whether he overpaid his own pre-1949 tax liabilities by more than approximately $12,000, and the district court was correct in granting summary judgment for the government on the basis of the District Director's affidavit and schedule (App., *infra*, pp. 6-8).[3]

Taxpayer's petition for a writ of certiorari is, in substance, an attempt to relitigate his tax liability, although he has had ample opportunity to present any and all defenses available to him. Further review by this Court is unnecessary, and the petition for a writ of certiorari should, accordingly, be denied.

Respectfully submitted,

RALPH S. SPRITZER,
Acting Solicitor General.

JOHN B. JONES, JR.,
Acting Assistant Attorney General.

DAVID O. WALTER,
JONATHAN S. COHEN,
Attorneys.

AUGUST 1965

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[3] Additionally, at our request the District Director of the Internal Revenue Service's Chicago office has reviewed his records and has accounted for the full $406,000 paid by petitioner. According to these records all but approximately $12,000 of the payments were applied to pre-1949 tax liabilities (and interest thereon) owed by petitioner, his former wife and his corporation. As stated in text petitioner was given credit for the approximately $12,000 overpayment.

APPENDIX

STATE OF ILLINOIS)
) SS
COUNTY OF COOK)

AFFIDAVIT

EUGENE C. COYLE, JR., being duly sworn on his oath, deposes and says:

1. That he is the District Director of the Internal Revenue Service, Chicago, Illinois, and a duly authorized delegate of the Secretary of the Treasury and the Commissioner of Internal Revenue.

2. That he has personal knowledge of the facts herein set forth.

3. That income tax deficiencies for the years 1949, 1950, and 1951 were assessed August 23, 1957 against Abraham Teitelbaum and Esther Melnick Teitelbaum as follows:

	1949	1950	1951
TAX	$30,172.46	$60,318.66	$139,544.99
PENALTY	—	$33,533.71	$90,704.24
INTEREST	$13,466.42	$23,302.00	$45,535.63
TOTAL	$43,638.88	$117,154.37	$275,784.86

4. That Notice and Demand for payment of these deficiencies were sent by ordinary mail to Abraham Teitelbaum and Esther M. Teitelbaum at 6911 Euclid Avenue, Chicago, Illinois on August 26, 1957. These notices contained a demand for the payment of the amounts shown thereon.

5. That the assessments against Esther M. Teitelbaum (only) were later abated because Esther M. Teitelbaum was determined never to have resided at

the Chicago address and, although a duplicate original of the Notice was later mailed to her actual residence in California, the sixty-day requirement for issuance of the statutory notice of deficiency was deemed not to have been met in her case;

6. That Notice of Federal Tax Lien covering the 1949, 1950, and 1951 deficiency assessments against Abraham Teitelbaum and Esther Melnick Teitelbaum were filed as follows:

(A) Document # 16997602 on August 28, 1957 with the Recorder of Deeds, Cook County, Chicago, Illinois;

(B) Document # 62796 on August 29, 1957 with the County Recorder of Riverside County, California;

(C) Document # 194896 on July 23, 1958 with County Recorder, Los Angeles County, California;

(D) Document Unnumbered on September 21, 1961 with the Clerk of Circuit Court, Dade County, Florida;

7. That the total amount now due on the deficiency assessments against Abraham Teitelbaum is as follows:

	Outstanding Assessment	Accrued Interest to 12/23/63	Total
1949	$28,820.92	$12,385.55	$41,206.47
1950	$86,995.04	$33,058.12	$120,053.16
1951	$261,720.71	$99,465.87	$361,186.58
			$522,446.21

Additional interest accrues at the daily rate of $62.06.

Further affiant sayeth not.

/s/ Eugene C. Coyle, Jr.
EUGENE C. COYLE, JR.

Subscribed and Sworn to Before me
this 3rd day of December A.D., 1963

/s/ [Illegible]
Notary Public

☆ U. S. GOVERNMENT PRINTING OFFICE: 1965 781808 46